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No. 87-23

In The
Supreme Court of the United States
October Term, 1987

LLOYD O. LONG, M.D.,

Appellant,

v.

BRADLEY M. HARRISON, a Minor, by and through his Next Friends and Natural Parents, MICHAEL L. and MARLA K. HARRISON, and MICHAEL L. and MARLA K. HARRISON,

Appellees,

v.

FLETCHER BELL, Commissioner of Insurance, State of Kansas,

Intervenor/Appellee.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

APPELLANT'S BRIEF IN OPPOSITION TO INTERVENOR-APPELLEE'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AFFIRM

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Lloyd O. Long, M.D. ("Appellant") appeals from the final decision of the Kansas Supreme Court, dated March 27, 1987. That decision upheld the constitutionality of the Kansas Health Care Provider Insurance Act, K.S.A. 40-3401, et seq., ("the Act"). Fletcher Bell, Commissioner of Insurance for the State of Kansas, ("Intervenor") has filed a motion to dismiss the appeal, or in the alternative, to affirm the decision of the Kansas Supreme Court, pursuant to U.S. Sup. Ct. Rule 16.1(b), 28 U.S.C.A., and U.S.

Sup. Ct. Rule 16.1(d), 28 U.S.C.A. Pursuant to U.S. Sup. Ct. Rule 16.5, 28 U.S.C.A., Appellant files his Brief In Opposition To Intervenor-Appellee's Motion To Dismiss, Or In The Alternative, Motion To Affirm.

Intervenor, as grounds for his motions, argues that Appellant lacks standing to challenge the Act, that the appeal does not present a substantial federal question, and that the Act contains adequate due process safeguards to protect Appellant's rights and interests. Intervenor's motion should be denied as Appellant will demonstrate below.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment, Section 1, United States Constitution; Section 18, Bill of Rights, Kansas Constitution; Kansas Statutes Annotated, Section 40-3401, *et seq.* (1981).

The above-mentioned constitutional provisions, and pertinent portions of the statutes were reproduced in the Appendix to Intervenor-Appellee's Motion To Dismiss, Or In The Alternative, Motion To Affirm, and thus, Appellant will not include them in the Appendix to his brief.

ARGUMENT OPPOSING MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AFFIRM

A. Appellant Has Standing To Challenge The Act.

Standing is a question of whether a party has alleged such a personal stake in the outcome of the controversy as to warrant the invocation of jurisdiction and to justify

the exercise of the Court's remedial powers on his behalf. *Warth v. Seldin,* 422 U.S. 490, 45 L.Ed.2d 343, 95 S. Ct. 2197 (1975). This Court has stated that, in its constitutional dimension, standing imparts justiciability: whether the plaintiff has made out a case or controversy between himself and the defendant within the meaning of Article III of the U.S. Constitution. This is the threshold question in every federal case determining the power of the Court to entertain the suit. *Warth v. Seldin,* 422 U.S. at 498.

Standing requires the coexistence of three factors: (1) injury in fact to the party; (2) "individuated" injury; and (3) causation in fact. *Duke Power Co. v. Carolina Env. Study Group,* 438 U.S. 59, 57 L.Ed.2d 595, 98 S. Ct. 2620 (1978). There can be no doubt that Appellant has sustained injury in fact. Settlement of the malpractice suit initiated against him has resulted in increased malpractice insurance premiums and a 400% increase in surcharges which the Kansas Health Care Stabilization Fund ("the Fund") has collected from Appellant since 1984. Surcharges are in direct proportion to a physician's medical malpractice insurance premium. Appellant has felt the affects of the act individually, and not merely as a member of the class of Kansas physicians. As such, Appellant has suffered a distinct and palpable injury satisfying the first and second elements of the test for standing.

The final element necessary for standing is causation. "Standing to sue" means that a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. *Dutoit v. Board of Johnson County Comm'rs,* 233 Kan. 995, 667 P.2d 879 (1983). Thus, to have standing, Appellant must show that he suf-

fered some injury and that there was some causal connection between the claimed injury and the challenged conduct. Appellant argued in the Kansas Supreme Court, and reiterates his argument here, that "but for" the Act, he would have had an opportunity to defend himself and present his defense to the alleged malpractice in a Court of law. The element of causation is satisfied due to the fact that injury to the Appellant would not have occurred "but for" the Act. *Duke Power Co. v. Carolina Env. Study Group,* 438 U.S. 59, 57 L.Ed.2d 595, 98 St. Ct. 2620 (1978). In the absence of the Act, Appellant's insurance carrier would have been obligated to defend him in Court since the potential liability for the injuries claimed by Plaintiffs in the action below, greatly exceeded Appellant's policy limits. However, the Act allowed the Fund to settle the claim, so that no further litigation could possibly occur. Thus, "but for" the Act, a substantial claim against Appellant would have afforded him an opportunity to defend himself in Court. The direct affect of the Act is to completely deny Appellant the opportunity to present any defense to any alleged malpractice.

The Kansas Supreme Court determined that Appellant had standing to challenge the Act. While the conclusion is not binding on this Court, the Court should independently find that Appellant has standing on the same grounds. Under the factual circumstances presented, Appellant has a sufficient stake in a justiciable controversy to obtain judicial resolution of the controversy.

B. This Appeal Presents A Substantial Federal Question.

Appellant's claim that the Kansas Health Care Provider Insurance Act violates the Fourteenth Amendment due process clause to the United States Constitution raises

a substantial federal question. The Kansas Supreme Court has expressly rejected Appellant's federal constitutional claim in holding that the provisions of the Act do not deprive a health care provider of a property right, i.e., the right to defend an action, or a due process right. The Kansas Supreme Court concluded that the Act did not violate the Fourteenth Amendment to the U.S. Constitution or Section 18 of the Bill of Rights of the Kansas Constitution.

While an appeal of a State Court's application of state law does not raise a substantial federal question, an appeal of a State Court's application of federal law does raise a federal question. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 53 L.Ed. 2d 965, 97 S. Ct. 2849 (1977).

As was more fully elaborated in Appellant's Jurisdictional Statement, the Act completely severs a physician's right to have a meaningful hearing to defend a malpractice claim against him. The Act takes "property" from the physician that he is otherwise guaranteed by the Fourteenth Amendment to the United States Constitution and the Constitution of the State of Kansas, Bill of Rights, Section 18. Minimum procedural requirements are a matter of federal law. While the state may freely legislate regarding substantive issues, federal procedural requirements are inviolate. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 1 L.Ed.2d 265, 102 S. Ct. 1148 (1982). Thus, this appeal raises a substantial federal question.

C. The Act Does Not Contain Adequate Due Process Safeguards.

In order to determine whether the Act contains adequate due process safeguards, it is necessary to determine what "process" is due under the circumstances. As Intervenor correctly notes, the cornerstones of due process are notice of the charges against one and an opportunity to be heard at a meaningful time in a meaningful manner. As this Court has noted previously, the precise process which is required is based on a balancing of numerous factors. In *Mathews v. Eldridge,* 424 U.S. 319, 47 L.Ed. 2d 18, 96 S. Ct. 893 (1976), this Court stated:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Governments interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 334, 335.

The private interest of Appellant affected is compelling; it is the right to defend oneself in Court. The deprivation through the process accorded is total. The process does simply not allow objecting physicians to have a voice in defending a cause of action under the circumstances. Appellant acknowledges there is great public interest in resolving malpractice claims, compensating those truly injured, and in alleviating administrative burdens on the Court created by litigation. However, in disputed cases

litigation itself acts to protect the public interest in having fund monies paid out only to those who are actual malpractice victims. Under the test in *Mathews*, procedural due process has not been accorded to Appellant. The Act's process only afforded Appellant the opportunity to object for the record, rather than allowing him to be heard in a meaningful way.

In analyzing the competing interests and evaluating the procedural protections of the Act, it is important to note that any proposed settlement between a claimant and the Fund must be given Court approval, after a hearing, upon a finding that the settlement is valid, just and equitable. K.S.A. § 40-3401. The health care provider is afforded notice of the hearing and is permitted to appear and be heard. Intervenor points out in his Motion To Dismiss that Appellant took advantage of these procedural safeguards, but that the settlement was approved over his objection. Intervenor fails to disclose to the Court that the only mention of Appellant's objection to the settlement was a one line statement by his insurance carrier's attorney who stated "For the record, Dr. Long does not approve of the settlement and in fact personally objects to same." The District Court Judge did not address even one single question to Appellant. In addition, the "notice of hearing" which Appellant received was in the nature of fifteen hours prior to the hearing. The alleged due process safeguards which Intervenor claims have been afforded to Appellant, were not, and are not adequate to protect the individual's interest under the due process clause of the Fourteenth Amendment.

In its zeal to protect Kansas citizens, and to provide them with "health and welfare", the Kansas Legislature

has damaged an equally worthy objective, that of providing justice for its health care providers.

CONCLUSION

In summation, this appeal should not be dismissed because Appellant has standing to challenge the Act, the appeal presents a substantial federal question, and the decision of the Kansas Supreme Court rests on an adequate non-federal basis. In addition, this appeal should not be affirmed as the decision of the Kansas Supreme Court was incorrect, in that the Act does not contain procedural safeguards sufficient to satisfy the due process clause of the Fourteenth Amendment of the United States Constitution. Accordingly, Intervenor's Motion To Dismiss, Or In The Alternative, Motion To Affirm should be denied.

Respectfully submitted,

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